BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHARLES W. TALLMAN Claimant VS. **DEFFENBAUGH DISPOSAL, INC.** Respondent AND **FIDELITY & GUARANTY INSURANCE** Insurance Carrier	)	Docket No. **1,029,680**
CHARLES W. TALLMAN Claimant VS. **MEDSERVE, INC.** Respondent AND **ZURICH AMERICAN INSURANCE** Insurance Carrier	)	Docket No. **1,029,986**

ORDER

Respondent, Deffenbaugh Disposal, Inc., and its insurance carrier, Fidelity & Guaranty Insurance, request review of the August 28, 2008 Award by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on November 21, 2008.

APPEARANCES

E.L. Lee Kinch of Wichita, Kansas, appeared for the claimant. Terry J. Torline of Wichita, Kansas, appeared for respondent, Deffenbaugh Disposal, Inc. (Deffenbaugh), and

its insurance carrier. Wade A. Dorothy appeared for respondent, Medserve, Inc. (Medserve), and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

It was undisputed that claimant suffered accidental injury arising out of and in the course of his employment with respondent Deffenbaugh on October 17, 2005, (Docket No. 1,029,680). Claimant also alleged he suffered repetitive injuries as he continued working after that date for respondent Deffenbaugh as well as respondent Medserve (Docket No. 1,029,986). Medserve acquired ownership of Deffenbaugh effective November 1, 2005, and claimant continued his employment with the successor company, Medserve, until November 22, 2005.

The Administrative Law Judge (ALJ) found claimant sustained a 62.5 percent work disability based upon a 65 percent task loss and a 60 percent wage loss. The ALJ further found that claimant's benefits were to be paid by Deffenbaugh as claimant's permanent disability was caused by his accidental injury suffered on October 17, 2005.

Deffenbaugh and Fidelity request review and argue claimant suffered personal injury by accident arising out of and in the course of his employment with Medserve from November 1, 2005 through November 22, 2005; Deffenbaugh further requests review of the nature and extent of disability; and, whether claimant is entitled to future medical. Deffenbaugh argues the claimant's back condition is the natural and probable consequence of injuries claimant suffered to his back in 1993. Deffenbaugh further argues that claimant suffered repetitive aggravations constituting new accidents as he worked for Medserve from November 1, 2005 through November 22, 2005. Deffenbaugh next argues claimant suffered an intervening accident at his home on November 25, 2005. In the alternative, Deffenbaugh argues the claimant failed to prove a task loss.

Medserve and Zurich argue the greater weight of the evidence demonstrates that any change in claimant's low back condition after the injury on October 17, 2005, was a direct and natural consequence of that accident. Medserve further argues the facts of this claim are similar to those in *Logsdon*[1] and therefore the ALJ's Award should be affirmed.

Claimant argues the ALJ's Award should be affirmed.

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[1] *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, 128 P.3d 430 (2006).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. The Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein except as hereinafter noted.

Briefly stated, claimant injured his back on October 17, 2005, while lifting a full 96-gallon container onto the top of another container. Claimant felt pain in his left gluteus just below the belt line. He continued to work and his pain increased going down into his leg and foot. Respondent referred claimant to their company physician for medical treatment with Dr. Randall V. Goering on October 31, 2005. The doctor prescribed a muscle relaxant, pain medication, and released him to return to work with restrictions. Claimant was restricted from lifting greater than 25 pounds and no bending or stooping.

The last day claimant worked for Deffenbaugh was October 31, 2005. Deffenbaugh sold its business to Medserve, Inc., effective November 1, 2005. Claimant continued to work in the same capacity as he had for Deffenbaugh. And Medserve accommodated claimant's restrictions from Dr. Goering by providing claimant with a helper to perform the lifting requirements of his job. The last day claimant worked for Medserve was November 22, 2005. On November 23, 2005, claimant was seen again by Dr. Goering due to continued complaints of back pain and left leg radiculopathy. The doctor ordered an MRI of the lumbosacral spine and took claimant off work until November 28, 2005.

On November 25, 2005, claimant was admitted to Newton Medical Center. He described the events as follows:

> I woke up that morning, got out of bed, went to move a curtain and I had a stabbing pain and was transported by EMS to Newton Medical Center where I spent a while in the ER department and they did an MRI and then I was admitted to the hospital.[2]

Dr. Vello Kass examined and evaluated claimant on November 25, 2005. Claimant provided the doctor with a history of persistent low back and left leg pain for a month after a lifting injury but on the morning of November 25, 2005, claimant reached for the shower curtain and suffered a significant increase in leg pain. Dr. Kass diagnosed claimant as having a herniated left disk with sciatica at L5-S1. The doctor recommended an epidural

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[2] R.H. Trans. at 38-39.

and that was performed by the anesthetist. On November 25, 2005, an MRI was performed and revealed left paracentral disk herniation at L5-S1 contacting the left S1 nerve root.

On November 26, 2005, claimant was released from the hospital and then returned to the emergency room on November 27, 2005, due to increased back pain. The doctor prescribed a morphine pump to control his pain and then released him on November 29, 2005, with a prescription for Percocet. Respondent referred claimant to an orthopedic surgeon, Dr. Anthony Pollock. Dr. Pollock examined and evaluated the claimant on December 14, 2005. Claimant received a third epidural and then the doctor recommended a diskectomy. Surgery was performed on January 24, 2006. Claimant continued to follow-up with Dr. Pollock after surgery and then was referred to physical therapy. A referral was made for claimant to see a neurologist due to complaints of pain going down his leg. On July 17, 2006, claimant was released from Dr. Pollock's care with restrictions.

Deffenbaugh and Fidelity request review of the ALJ's determination that claimant's permanent disability was the result of his accidental injury on October 17, 2005. Deffenbaugh argues that claimant either suffered accidental injury while employed by Medserve, his condition was a natural and probable consequence of pre-existing back injuries in 1993 or he suffered an intervening non-occupational injury at home.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[3] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[4] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[5]

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson,*[6] the court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows

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[3] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[4] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[5] *Nance v. Harvey County*, 263 Kan. 542, 549, 952 P.2d 411 (1997).

[6] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

> from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman,*[7] the court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig,*[8] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber,*[9] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."[10]

In *Logsdon*,[11] the Kansas Court of Appeals reiterated the rules found in *Jackson* and *Gillig*:

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[7] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[8] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[9] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[10] *Id.* at 728.

[11] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006).

> Whether an injury is a natural and probable result of previous injuries is generally a fact question.
>
> When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.
>
> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

In *Casco*,[12] the Kansas Supreme Court stated: "When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury."

It was undisputed claimant injured his back in the lifting incident on October 17, 2005. He was receiving treatment and on October 31, 2005, he was provided restrictions which were accommodated as he continued to perform his job with the successor corporation, Medserve. Claimant testified that as he continued working his condition worsened even though he was only driving a truck and not doing any lifting.

Deffenbaugh initially argues that claimant suffered repetitive aggravations which constituted a new accidental injury as he continued performing his job for Medserve from November 1, 2005 through November 22, 2005.

Dr. Kass opined that each day the claimant worked from November 1, 2005 through November 22, 2005, he continued to suffer aggravations to his low back and leg conditions. Likewise, Dr. Goering opined that claimant suffered a worsening of his symptoms while working after the restrictions were imposed on October 31, 2005. But Dr. Goering agreed that if not for the accident on October 17, 2005, it was unlikely there would have been a worsening of claimant's symptoms thereafter. Conversely, Dr. Pollock testified that any aggravations the claimant suffered after October 17, 2005, were the natural consequence of the October lifting incident. Likewise, Dr. Fluter agreed that any aggravations in November would not have occurred but for the October 17, 2005 accidental injury. Dr. Stein opined that any worsening of claimant's symptoms from October 17, 2005, until his last day worked was a natural and probable consequence of the accidental injury on October 17, 2005.

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[12] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007).

The ALJ analyzed the evidence in pertinent part:

> The threshold issue before the court is whether Claimant suffered additional accidental injuries after October 17, 2005, and particularly after November 1, 2005, when Engineered Recovery Systems [Medserve] assumed ownership of the business and became liable for workers compensation injuries suffered during its ownership. The medical evidence is somewhat controverted, but the court finds and concludes that Claimant's injuries and resulting impairment and disability all flow form the October 17, 2005 accident. The greater weight of the medical evidence establishes that, even if Claimant's condition deteriorated after November 1, 2005, that deterioration represents the natural and probable consequence of the October 17, 2005 injury. Similarly, the greater weight of the medical evidence establishes that "but for" the October 17, 2005 precipitating injury, the subsequent deterioration in Claimant's condition would not have occurred.[13]

The Board agrees and affirms.

Deffenbaugh next argues that claimant's injury on October 17, 2005, was the natural and probable consequence of claimant's preexisting condition from an injury he suffered to his low back in 1993.

The claimant had suffered accidental injury to his low back while lifting in 1993. He had received conservative treatment and a diagnostic CT scan without contrast had revealed a herniated disk at L5-S1. Claimant testified that after he was released from the conservative treatment he received for that injury he had neither sought nor received medical treatment for his back until after the October 17, 2005 lifting incident. And claimant testified that he had returned to work after the 1993 injuries without restrictions.

Dr. Kass opined that the October 17, 2005 lifting incident represented an aggravation, acceleration, and intensification of claimant's preexisting pathology from 1993. Conversely, Dr. Goering noted it was more probable than not that the symptoms he treated claimant for were related to the October 17, 2005 accident and not the injury claimant had suffered in 1993. Likewise, in a medical note dated December 14, 2005, Dr. Pollock had observed that claimant's low back condition was not an aggravation of a preexisting process because the claimant's symptoms were different and on the wrong side. Dr. Stein opined that the claimant's condition after the October 17, 2005 accidental injury was not a natural and probable consequence of the claimant's 1993 injury and preexisting condition of his back.[14]

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[13] ALJ Award (Aug. 28, 2008)at 9-10.

[14] Stein Depo. (May 7, 2008) at 10-11.

After the 1993 injuries to his back the claimant returned to work without restrictions and never sought medical treatment for his back until the October 17, 2005 lifting incident at work for Deffenbaugh. The Board finds Dr. Stein's testimony most persuasive and affirms the ALJ's determination that claimant's October 17, 2005 back injury was not the natural and probable consequence of injuries claimant had suffered in 1993.

Deffenbaugh also argues that claimant suffered an intervening non-occupational injury when he reached for a curtain at home on November 25, 2005.

Dr. Pollock agreed that any aggravations claimant suffered after October 17, 2005, including the incident where claimant reached for the curtain, were the natural consequence of the October 17, 2005 accidental injury. Dr. Fluter testified that the incident reaching for the shower would not have occurred but for the October 17, 2005 injury. Dr. Fluter testified:

> Q. Doctor, just addressing your -- focusing on this episode that occurred on the 25th of November, the day after Thanksgiving involving reaching up and closing the curtain, in your opinion, Doctor, would this -- would the symptoms associated with that activity have occurred but for the injury that Mr. Tallman sustained on the 17th of October?
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> MR. TORLINE: I'm going to raise an objection. Because of the incomplete medical history provided, the question calls for speculation, there's a lack of foundation for the answer. Now you may answer.
>
> A. Okay. Well, again -- I mean, certainly based upon the information available and to what I consider a reasonable degree of medical probability, the initial event happened in October. There had been some intervening periods of time where he never was -- as far as I can tell, ever became pain-free. Under the circumstances of the case, I would say that, yes, but for that initial injury, I wouldn't anticipate the event that happened in November causing the problems that it did. Now, is it possible? Sure, it is possible that it could have been -- it could have happened without any prior initiating event. But under the circumstances given, to me, it seems more likely than not that it would not have occurred but for the October 17, 2005 injury.[15]

Likewise, Dr. Stein opined that the incident reaching for the shower curtain was a natural and probable consequence of the October 17, 2005 injury. Dr. Stein testified:

> Q. Well, let me ask you this, Doctor: The episode relating to the curtain incident, in your opinion, was that a direct and natural consequence of the initial precipitating event that occurred on the 17th of October?

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[15] Fluter Depo. (Mar. 25, 2008) at 30-31.

A. Yes.[16]

The Board finds that the preponderance of the medical evidence establishes that any worsening of claimant's symptoms, including the incident reaching for the shower curtain, was a natural and probable consequence of the injury claimant suffered on October 17, 2005, while working for Deffenbaugh.

Turning to the nature and extent of disability, functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the AMA *Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein.[17]

Dr. Stein opined that claimant suffered a 13 percent whole person functional impairment. Dr. Stein placed claimant in DRE Lumbosacral Category lll of the AMA *Guides*[18] for 10 percent and because of claimant's residual pain added an additional 3 percent for pain for a 13 percent rating. Dr. Pollock offered the opinion that claimant suffered a 10 percent impairment but never indicated what the basis was for that opinion nor whether it was based upon the AMA Guides. Consequently the ALJ determined that the uncontradicted medical evidence established that claimant suffered a 13 percent whole person functional impairment. The Board agrees and affirms.

Because claimant has sustained injuries that are not listed in the "scheduled injury" statute, his permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a). That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

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[16] Stein Depo. (Mar. 26, 2008) at 42.

[17] K.S.A. 44-510e(a).

[18] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

But that statute must be read in light of *Foulk*[19] and *Copeland*.[20] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a), that a worker's post-injury wage should be based upon the worker's ability to earn wages rather than the actual post-injury wages being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work-related injury.

Drs. Fluter and Stein offered task loss opinions based upon a list of claimant's former work tasks prepared by Doug Lindahl, a vocational rehabilitation counselor.[21] Dr. Fluter reviewed the list prepared by Mr. Lindahl and concluded claimant could no longer perform 28 of the 37 tasks or a 76 percent task loss. Dr. Stein reviewed the list of claimant's former work tasks prepared by Mr. Lindahl and concluded claimant could no longer perform 20 of the 37 tasks or a 54 percent task loss.

Deffenbaugh argues claimant failed to meet his burden of proof because he failed to list additional tasks he performed at his former employment with Wal-Mart. The ALJ analyzed the task loss evidence in the following fashion:

> The court has before it two opinions on Claimant's task loss. Dr. Fluter opines that Claimant has a 76% task loss, while Dr. Stein opines that the task loss is 54%. Respondent Deffenbaugh argues that Claimant has failed to sustain his burden of proof as to task loss, because he has failed to identify all of the jobs held and tasks performed in the 15 years preceding his injury. Respondent Deffenbaugh has offered into evidence employment records from Walmart that suggest Claimant worked for that company in capacities other than he reported and, presumably, performed other tasks than what he identified.
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> Claimant has objected to the Walmart personnel records on grounds of hearsay and foundation. The court overrules those objections and considers the

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[19] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). But see *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007), in which the Kansas Supreme Court held, in construing K.S.A. 44-510e, the language regarding the wage loss prong of the permanent disability formula was plain and unambiguous and, therefore, should be applied according to its express language and that the Court will neither speculate on legislative intent nor add something not there.

[20] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[21] The ALJ's Award refers to the task list prepared by Mr. Hardin. However, this is obviously an error as the only task list testimony in the evidentiary record was presented by Mr. Lindahl.

> Walmart records in these proceedings. Even if the records are hearsay, the court is not bound by technical rules of evidence, and hearsay may be considered. Although those records are in evidence and considered by the court, it does not find Respondent Deffenbaugh's argument to be persuasive.
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> Claimant's established failure to identify some of the jobs held and tasks performed is not fatal to consideration of the task loss; rather it goes to the weight to be given to Claimant's evidence. Respondent has presented no countervailing evidence of task loss, and admission of the Walmart records does not, in and of itself, establish what tasks, if any, were performed in alternative positions at Walmart. Nor do those records establish whether Claimant lost or retained the ability to perform additional tasks. In short, while Respondent Deffenbaugh's Walmart evidence ***suggests*** Claimant may have performed additional tasks in the relevant time period, that evidence fails to ***identify*** any additional tasks. Without the identification of any additional tasks, the task loss evidence of Drs. Fluter and Stein is relevant, material, substantial and, in this court's view, admissible. **Claimant has sustained a 65% task loss.**[22]

The Board agrees and affirms.

Turning to the wage loss component of the work disability formula, Deffenbaugh argues that claimant did not have a good faith reason for leaving a job where his wage loss had been reduced to 39 percent. The ALJ analyzed that issue in the following fashion:

> Here, Claimant voluntarily left employment with Securitas Security Services, where his wage loss had been reduced to 39%, and found alternative employment with Auto Zone, selling auto parts, where his wage loss is up to 60% because of reduced hours and a lower hourly rate. Claimant's testimony is uncontroverted that the stress of the Securitas job was adversely affecting his pain level, and that he had been advised by Dr. Salone to consider changing jobs. The court concludes that Claimant had a good faith reason for changing jobs, and has suffered a 60% wage loss.[23]

The Board agrees and affirms. Consequently, claimant has met his burden of proof to establish that he suffers a 62.5 percent work disability as a result of his accidental injury while working for Deffenbaugh.

After claimant achieved maximum medical improvement his employment history included periods of unemployment as well as periods where his employment resulted in different percentages of wage loss. The work disability formula requires that the

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[22] ALJ Award (Aug. 28, 2008) at 11-12.

[23] *Id.* at 13.

percentage of wage loss and task loss be averaged to arrive at the work disability. As previously noted, there were periods of time when claimant's wage loss changed. Generally, whenever there is no gap in disability benefits, the total disability compensation award is the same as if the award were calculated using only the last percentage of permanent impairment. There would be no difference in compensation had this award been calculated using the various changed percentages of wage loss and resultant work disabilities. Because of this, the Board sometimes will only show the abbreviated calculation, but with an explanation that although the percentage of disability changed it makes no difference in the award. That is the case here.

Finally, the ALJ denied claimant any award against Medserve in Docket No. 1,029,986, as the evidence failed to establish claimant suffered personal injury by accident arising out of and in the course of his employment with Medserve. The Board agrees and affirms.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Bruce E. Moore dated August 28, 2008, is affirmed.

IT IS SO ORDERED.

Dated this 31st day of March 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: E.L. Lee Kinch, Attorney for Claimant
Terry J. Torline, Attorney for Deffenbaugh Disposal, Inc., and its Insurance Carrier
Wade A. Dorothy, Attorney for Medserve, Inc., and its insurance carrier.

Bruce E. Moore, Administrative Law Judge